LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 474

DAVID YOUNG,
Petitioner,

VERSUS

HONORABLE KENNETH HUGHES, a judge of the 24th Judicial District Composed of Creek, Okmulgee, and Okfuskee Counties, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

JOHN G. HERVEY,
2511 Liberty Bank Building,
Oklahoma City, Oklahoma;

GLENN O. YOUNG,
Young Building,
Sapulpa, Oklahoma,

Attorneys for Petitioner.

Of Counsel:
ELLIOTT HOWE,
Daniel Building,
Tulsa, Oklahoma.

September, 1957.

SUBJECT INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
How the Federal Questions Were Presented	2
How the Federal Questions Were Disposed of	4
Question Presented	5
Statement of the Case	5
Reasons for the Allowance of the Writ	6
The Judgment Below Denies the Equal Protection of the Laws and Is Reviewable by This Court	6
Conclusion	10

AUTHORITIES CITED

CASES:

A., T. & S. F. Ry. Co. v. Love, 209 Okla. 738, 119 Pac. 207	8
Best v. Evans, Judge, 297 P.2d 379 (1956)	4, 8
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682	7
Davis v. Wechsler, 263 U.S. 22, 24	7
Dewey v. Des Moines, 173 U.S. 193, 199	5, 7
Direct Contempt Proceedings Against David Young, In re, No. 4766-C, District Court, Creek County, Oklahoma	2
Dorchy v. Kansas, 272 U.S. 306, 308-309	5, 6

INDEX CONTINUED

	PAGE
Erie R. Co. v. Purdy, 185 U.S. 148, 154	6-7
Evans v. Willis, 22 Okla. 310, 97 Pac. 1047	8-9
Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276, 282	5
Michigan Central R. Co. v. Mix, et al., 278 U.S. 492, 49 Sup. Ct. 207, 73 L. Ed. 470	5
Roby v. Colehour, 146 U.S. 153, 159-160	7
Seay v. Howell, Judge, 28 Okla. Bar Journal 649 (not yet officially reported but reprinted herein as Appendix D, infra, pp. xiv-xix)	3
Williams v. Georgia, 349 U.S. 389	8, 9
Yick Wo v. Hopkins, 118 U.S. 373	10
STATUTES AND MISCELLANEOUS:	
21 Oklahoma Statutes, Sec. 540 (1951)	4
21 Oklahoma Statutes, Sec. 565 (1951)	3
Title 28, United States Code, Sec. 1257(3)	2
United States Constitution, Fourteenth Amendment	4, 5, 10

APPENDICES

Appendix A:	
Findings and Order of Respondent	i
Appendix B:	
Orders of the Supreme Court of the State of Oklahoma denying the Application to assume original jurisdiction, denying Petition for Rehearing and denying the Second Petition for Rehearing	iii-v

INDEX CONTINUED PAGE

Appendix C:

Transcript and Evidence in the District Court within and for Creek County, State of Oklahoma, in the Matter of Petition for Grand Jury—No. 30554 ..... vi-xiii

Appendix D:

Syllabus by the Supreme Court of the State of Oklahoma in the case of Seay v. Howell, District Judge, Supreme Court No. 37111—May 14, 1957 ..... xiv-xix

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

DAVID YOUNG,
Petitioner,

VERSUS

HONORABLE KENNETH HUGHES, a judge of the 24th Judicial District Composed of Creek, Okmulgee, and Okfuskee Counties, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma entered on June 21, 1957, in the above-entitled cause.

OPINIONS BELOW

The respondent, a trial judge in Oklahoma, adjudged petitioner, an attorney, guilty of contempt and sentenced him to ten days in the county jail of Creek County, Oklahoma. The order of the respondent is printed herein as Appendix A, *infra*, pp. i-ii. Petitioner sought a writ of

prohibition in the Supreme Court of Oklahoma which was denied without opinion. The orders of the Supreme Court of Oklahoma denying the application to assume original jurisdiction, denying the petition for rehearing, and denying the second petition for rehearing are printed herein as Appendix B, *infra*, pp. iii-v.

JURISDICTION

The order of the Supreme Court of Oklahoma refusing to assume original jurisdiction of the petition for writ of prohibition was entered on April 16, 1957 (R. 51). The order overruling the petition for rehearing was denied on June 4, 1957 (R. 73). Leave was granted to file a second petition for rehearing on June 11, 1957 (R. 74). The second petition for rehearing was denied on June 21, 1957 (R. 95-96). Jurisdiction of this Court was invoked under Title 28, United States Code, Section 1257(3), petitioner having asserted in the court below rights, privileges, and immunities conferred by the Constitution and laws of the United States.

How the Federal Questions Were Presented

The judgment of which review is sought is the judgment of the Supreme Court of Oklahoma denying and dismissing petitioner's petition for a writ of prohibition ordering and directing respondent to cease and desist all prosecution in a proceeding styled *"In re Direct Contempt Proceedings Against David Young,"* Case No. 4766-C in the District Court of Creek County, Oklahoma.

In substance, the allegations before the Supreme Court of Oklahoma, insofar as pertinent to the jurisdiction of this Court, were that petitioner had been denied constitutional rights guaranteed by the Fourteenth Amendment of the Constitution of the United States. Petitioner, while in the lawful exercise of his duties as attorney, had been summarily ordered, by the respondent, placed under arrest and in the custody of the Sheriff of Creek County, Oklahoma, with directions that petitioner be confined to jail for a period of ten days, for alleged contempt of court. The transcript of evidence is short and is reprinted herein as Appendix C, *infra*, pp. vi-xiii. Upon being adjudged guilty of contempt, petitioner filed his petition for writ of prohibition, an original proceeding, in the Supreme Court of Oklahoma (R. 50).[1] That Court declined to assume original jurisdiction (R. 51). A petition for rehearing was timely and duly filed (R. 52-72), but while the said petition for rehearing was pending, the Supreme Court of Oklahoma decided *Seay* v. *Howell, Judge*, 28 Okla. Bar Journal 649 (not yet officially reported but reprinted herein as Appendix D, *infra*, pp. xiv-xix), wherein the Court held that contempts are defined by statute[2] and that any act not so

Constitution of Oklahoma,

[1] Article VII, § 2, provides: "• • • The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of • • • prohibition, and such other remedial writs as may be provided by law, and to hear and determine the same • • •."

[2] "Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and willful refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be deemed direct contempts of court, and may be summarily punished as hereinafter provided for."—21 Oklahoma Statutes, § 565 (1951).

defined but which is defined as a crime by other provision of the Oklahoma Statutes, is not a contempt. The petition for rehearing was denied (R. 73). Thereupon leave to file second petition for rehearing was granted (R. 74). The second petition for rehearing expressly asserted the federal rights of the petitioner. It directed the attention of the Supreme Court of Oklahoma to the fact that the acts of the petitioner were, as in the *Seay* case, not embraced in the statutory definitior of contempt but were expressly defined as a crime by other provisions of the statute,[3] and that to issue the writ of prohibition in the one case and to deny same to petitioner constitutes an unequal application of the law and violates the equal protection of the law guaranty of the Fourteenth Amendment. The second petition for rehearing was denied (R. 95-96).

How the Federal Questions Were Disposed of

The Supreme Court of Oklahoma denied, without written opinion, the application to assume original jurisdiction and grant the writ of prohibition. Likewise, that Court denied, without opinion, the petition for rehearing and the second petition for rehearing. But prior to this decision, writ of prohibition had been recognized by the Supreme Court of Oklahoma as an available remedy to review the merits of a contempt action of the type here complained of. *Best* v. *Evans, Judge*, 297 P.2d 379 (1956).

Although the Supreme Court of Oklahoma did not write an opinion and did not rule expressly upon petition-

[3] "Every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor."—21 Oklahoma Statutes, § 540 (1951).

er's federal constitutional rights, it nevertheless so disposed of these allegations as to confer jurisdiction upon this Court. *Michigan Central R. Co.* v. *Mix, et al.*, 278 U.S. 492, 49 Sup. Ct. 207, 73 L. Ed. 470. Actual determination by the state court of the federal questions in terms is not required. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276, 282; *Dorchy* v. *Kansas*, 272 U.S. 306, 308-309; *Dewey* v. *Des Moines*, 173 U.S. 193, 199.

QUESTION PRESENTED

Whether the judgment of contempt and the refusal of the Supreme Court of Oklahoma to assume original jurisdiction and to issue the writ of prohibition denied to petitioner rights guaranteed by the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

On January 30, 1957, the District Court of Creek County, Oklahoma, adjudged petitioner, who asked, in an orderly and courteous manner, to be heard, to be "guilty of willful and contumacious contempt," for allegedly attempting to make a record with the court reporter while a grand jury was being impanelled, assessed the punishment at ten days in the County Jail, and ordered the Sheriff of Creek County, Oklahoma, to take custody of petitioner until he had purged himself of the contempt (R. 26-41, Appendix C, *infra*, pp. vi-xiii). On February 2, 1957, petitioner filed a motion for new trial which, on February 11, 1957, was overruled (R. 45). On April 4, 1957, petitioner made application for leave to file a petition for a writ of prohibition, an orig-

inal proceeding, in the Supreme Court of Oklahoma (R. 1-5). The petition for writ of prohibition was annexed to the application (R. 6-50). On April 16, 1957, the Supreme Court of Oklahoma denied the application to assume original jurisdiction (R. 51). No opinion was written. Thereupon petition for rehearing was duly and timely filed (R. 52-72) and same was denied (R. 73). Application for leave to file second petition for rehearing was granted on June 11, 1957 (R. 74). Second petition for rehearing, expressly raising the federal right posed under the *Seay* case, *supra*, was filed timely and was denied, without opinion, on June 21, 1957. The order entered on June 21, 1957, erroneously recited that the motion for leave to file second petition for rehearing was denied (R. 92) but said error was corrected by order *nunc pro tunc* correctly reciting the denial of the second petition for rehearing (R. 95-96). The Supreme Court of Oklahoma granted a stay of execution of the sentence pending perfection of this petition for writ of certiorari and consideration of the same by this Court (R. 100-101).

REASONS FOR THE ALLOWANCE OF THE WRIT

The Judgment Below Denies the Equal Protection of the Laws and Is Reviewable by This Court

No opinion was written by the Supreme Court of Oklahoma and the reasons for the denial of the writ have not been spelled out. But this Court has repeatedly held that review was warranted where a federal question was fairly presented, was necessary to a determination of the cause and there existed no adequate non-federal ground upon which the decision below could have been properly based. *Dorchy* v. *Kansas*, 272 U.S. 306, 308-309; *Erie R. Co.* v.

Purdy, 185 U.S. 148, 154; *Dewey* v. *Des Moines*, 173 U.S. 193, 199; *Roby* v. *Colehour*, 146 U.S. 153, 159-160.

As MR. JUSTICE BRANDEIS wrote in *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 682:

> "* * * while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

It is the practice of the Supreme Court of Oklahoma not to issue opinions in causes wherein the Court, as herein, declines to assume original jurisdiction. But as stated in *Davis* v. *Wechsler*, 263 U.S. 22, 24:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The basis of the ruling below is not stated but the record is clear that the federal question was timely and properly raised (R. 86-89). Until the holding in the instant case, writ of prohibition, in the Supreme Court of Oklahoma, was considered to be the appropriate remedy where an inferior court is attempting to make an excessive and unauthorized application of judicial force in a case otherwise cognizable by it. Where a state court has frequently dealt with particular issues under a specific procedure, this Court has held that a subsequent refusal to

consider those issues under that procedure will not bar relief by this Court. *Williams* v. *Georgia*, 349 U.S. 375. The instant case is presented in that posture.

The leading Oklahoma case on writ of prohibition to review a finding of contempt by a trial court is *Best* v. *Evans, Judge of the 12th Judicial District of Oklahoma, etc.*, 297 P.2d 379 (1956), wherein the Court held that the action of a trial judge in pressing contempt charges against an attorney was an unauthorized exercise of judicial force and granted a writ of prohibition. The Court said:

> "Under Article VII, 2 Oklahoma Constitution, the Supreme Court has superintending control over all inferior courts. We are of opinion and hold that this Court is empowered, in the exercise of its superintending control, to issue its writ to prohibit the exercise of unauthorized judicial force by a lower court, whether such lower court is acting in its civil or criminal jurisdiction. See *Heard* v. *Sullivan*, Okl., 280 Pac. 2d, 708."

In an earlier case, *A., T. & S. F. Ry. Co.* v. *Love*, 209 Okla. 738, 119 Pac. 207, which has not been overruled nor limited by subsequent holdings, the Court held:

> "Prohibition is the proper remedy, where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force, and the writ will not be withheld because other concurrent remedies exist; it not appearing that such remedies are equally adequate and convenient."

In an early case, *Evans* v. *Willis*, 22 Okla. 310, 97 Pac. 1047, the Supreme Court of Oklahoma held that writ of prohibition is a proper writ. The Court said (p. 1051):

"When it appears to the court having jurisdiction to issue the writ of prohibition that the lower court, under any conditions, is without jurisdiction to try the accused upon the alleged information filed, with all amendments permitted under the law considered as made, to require him to invoke the remedy of appeal, occasioning delay and necessitating a supersedeas bond, or resulting in his being confined in jail pending the determination of his appeal, when the same conclusion as to the lower court being without jurisdiction will be reached, would work an unnecessary and unreasonable hardship upon the accused."

The Oklahoma precedents prior to the holding in the instant case unreservedly held that prohibition was a normal and clearly appropriate remedy to review an adjudication of contempt of an attorney by a lower trial court. It is respectfully submitted that the federal constitutional issues in this case are reviewable by this Court, as they were in *Williams* v. *Georgia*, *supra*, where after reviewing prior state court decisions in Georgia on the question of the use of an extraordinary motion, contrary to the decisions in the case then being considered, this Court held, 349 U.S. at 389:

"We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us."

In short, petitioner's contention is that the order of the Supreme Court of Oklahoma declining to assume original jurisdiction and issue the writ of prohibition in the case at

bar while assuming jurisdiction and issuing the writ in the *Seay* case, *supra*, and other like case, constitutes an unequal application of the law to persons similarly situated and denies the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. This action by the Supreme Court of Oklahoma is contrary to applicable decisions of this Court.

> "* * * though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an uneven hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."—*Yick Wo* v. *Hopkins*, 118 U.S. 373.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. HERVEY,
2511 Liberty Bank Building,
Oklahoma City, Oklahoma;

GLENN O. YOUNG,
Young Building,
Sapulpa, Oklahoma,

Attorneys for Petitioner.

Of Counsel:
ELLIOTT HOWE,
Daniel Building,
Tulsa, Oklahoma.

September, 1957.

APPENDIX

APPENDIX A

Findings and Order of Respondent

(Received and filed in District Court, Creek County, Jan. 30, 1957. Time 4:50. Lee Snider, Court Clerk, by Ray H. Weakley, Deputy.)

In the District Court within and for Creek County, State of Oklahoma. In re Direct Contempt Proceedings against David Young.—No. 4766-C.

Now on this 30th day of January, 1957, being one of the regular days of the January 1957 Term of the District Court of Creek County, Oklahoma, and with eleven (11) members of the Grand Jury in the Jury Box awaiting the qualifications of additional grand jurors called for the purpose of replacing a grand juror, one Kenneth Henderson, who on the 29th day of January, 1957, was discharged from the Grand Jury because of ill-health, and while the District Court was in the process of hearing the qualifications and exceptions of the jurors for the purpose of selecting a substitute juror for the one discharged, Mr. David Young, purporting to represent parties, attempted to have the judge of said Court hear an Application to Disqualify said Judge from presiding over said Grand Jury (which had not been filed with the Court Clerk), together with the service of Notice of an Application for a Writ of Mandamus to the Supreme Court to prohibit said Judge from presiding further with said Grand Jury, and having been advised by the Court that he was not a party to any law suit or cause of action, and being advised by the Court that he had no standing in the Grand Jury matter to attempt or even file such pleadings, particularly at that time, since the Grand Jury itself had been in session for a period from January

21st, 1957, and that the Court would not hear the same at that time.

Whereon said David Young attempted to make a record with the Court Reporter for what purpose the Court did not know, and after having been repeatedly advised to refrain from his activities and to quit interfering with the process of the Court in an attempt to re-empanel said Grand Jury, he was asked by the Court whether or not he had any legal reason to state to the Court why he should not be found in contempt of Court for disturbing and disrupting the orderly process of the District Court of Creek County, which question was asked the said David Young repeatedly, and to which he gave no satisfactory answer, nor did he state any reasons, legal or otherwise, why he should not be found in contempt of Court.

Whereupon, the Court found the said David Young guilty of wilful and contumacious contempt of the District Court of Creek County, Oklahoma, and thereon assessed the penalty therefor at ten (10) days in the County Jail, and order the Sheriff of Creek County, Oklahoma, to take custody of said David Young until he had purged himself of his contempt.

Upon request the Court set an appeal bond in the sum of Three Thousand Dollars ($3,000.00).

—Kenneth Hughes, District Judge.

(Record, pp. 38-40).

APPENDIX B

FILED
In Supreme Court
of Oklahoma
Apr 16 1957
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

April 16, 1957

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

• • •

• • •

37,761—David Young v. Hon. Kenneth Hughes, a Judge of the 24th Judicial District composed of Creek, Okmulgee and Okfuskee Counties, Okla. Application to assume original jurisdiction denied.

Earl Welch, Chief Justice

(Record p. 51)

FILED
In Supreme Court
of Oklahoma
Jun 4 1957
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

June 4, 1957

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

• • •

• • •

37,761—David Young v. Hon. Kenneth Hughes, a Judge of the 24th Judicial District composed of Creek, Okmulgee and Okfuskee Counties, Oklahoma. Petition for rehearing denied.

Earl Welch, Chief Justice

(Record p. 73)

FILED
In Supreme Court
of Oklahoma
Aug 12 1957
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DAVID YOUNG,

PETITIONER,

v. No. 37,761

HONORABLE KENNETH HUGHES, A JUDGE of the 24th Judicial District composed of CREEK, OKMULGEE, and OKFUSKEE Counties, Oklahoma,

RESPONDENT.

ORDER NUNC PRO TUNC

The above matter coming on for hearing on this 12th day of August, 1957, and there being present in open Court the application of said Petitioner for an order Nunc Pro Tunc herein, correcting the order made and entered on the 21st day of June, 1957, and filed herein, and the Court having examined the files in the Office of the Clerk of the Supreme Court of Oklahoma and having heard the evidence and being satisfied that by a clerical error it was recited in said order that Motion for Leave to File Second Petition for Rehearing instead of Second Petition for Rehearing was

denied, and it appearing that the proceedings are regular and that said mistake should be corrected.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED That the Order entered herein on the 21st day of June, 1957, be and the same is corrected to show the denial of the Second Petition for Rehearing instead of the Motion for Leave to File Second Petition for Rehearing.

DONE BY ORDER OF THE COURT IN CONFERENCE ON THIS THE 12th day of August, 1957.

Earl Welch
Chief Justice

(Record pp. 95-96).

APPENDIX C

Transcript and Evidence

In the District Court within and for Creek County, State of Oklahoma. In the Matter of Petition for Grand Jury—No. 30554.

Transcript of Evidence, taken on January 30th, 1957, before the Honorable Kenneth Hughes, in the above stated matter.

The Court: Each one of you new jurors, I want to read the Statute of disqualifications and exemptions. I will read the first portion of it first, which refers to disqualifications, actually it is qualifications.

David Young: Could we be heard?

The Court: What about?

David Young: Comes now David Young appearing on behalf of the petitioners and offers for filing an application which has heretofore been handed to the Judge—

The Court: Let the record show that such application as filed is a nullity and the court refuses to hear or rule on it at this time.

David Young: Do you accept receipt of that?

The Court: No; file it with the clerk if you want to.

David Young: Comes now David Young—

The Court: I want to tell you, we are picking a Grand Jury here this morning and I don't want any interference; if you do you will be in direct contempt of court and I will take care of it in the proper manner.

David Young: Could I speak to the Judge outside of the hearing of the Jury?

The Court: No, sir, not while I am calling a jury.

David Young: Will you accept receipt of that?

The Court: File it with the clerk.

David Young: Will you acknowledge receipt of the notice of the Supreme Court of the State of Oklahoma?

The Court: No.

David Young: At this time—

The Court: Mr. Garrett, don't make any further record for this man; if you don't know what the law is that is your problem. I want you to desist from any further activity in the court room, and go back there and set down and be a spectator like the rest, if you don't do it immediately it will be necessary for me to hold you in contempt of court.

David Young: I would like to give you a copy of this.

The Court: Let the record show that Mr. Young refuses to abide by the court's order. Do you have any reason, Mr. Young, why you shouldn't be fined in contempt of court? At this time I would like for you to state to the court any legal reason you might have for not being found in contempt of court at this time for attempting to interfere with the Grand Jury proceedings?

David Young: Could I have permission to talk to the Judge outside of the presence of the jury?

The Court: You have no permission to talk to me outside of anybody. Mr. Young, you have interfered with this Grand Jury considerably, and I won't allow you to interfere with the court qualifying the jury. Do you have an answer at this time?

David Young: Yes, Your Honor.

The Court: Make your statement.

David Young: The statement is, I am an attorney at law of Sapulpa, Oklahoma—could I make the statement outside of the Grand Jury's hearing?

The Court: Make your statement in open court, like everybody else.

David Young: I am an attorney at law, duly licensed and qualified to practice law before the Bar of the Supreme Court of the State of Oklahoma, and the Bar of Creek County; that I represent various petitioners who have signed the petition for grand jury herein, and that prior to the impaneling of the new grand juror, the petitioners in good faith presented to the Honorable Kenneth Hughes, District Judge of Creek County, a duly verified application and certificate for disqualification of the Honorable Kenneth Hughes, District Judge, to impanel and proceed with the appointment of the new grand juror; that said application is and was presented in good faith by David Young in behalf—

The Court: I asked for an answer to my question, as to whether or not you had a legal reason for me not holding you in contempt of court this morning for attempting to interfere with the function of the grand jury?

David Young: Yes, sir.

The Court: That isn't an answer; I want a legal reason, if you don't have this court will find you in contempt of court—

David Young: I plead not guilty.

The Court: Do you have a statement to make?

David Young: I am attempting to make one.

The Court: I want an answer, not a speech.

David Young: I plead not guilty. Now I would like an opportunity to be heard.

The Court: That is what I am trying to tell you; if you don't have enough sense, Mr. Young, to know what I am trying to tell you, what I am trying to let you do—

David Young: I am trying, Your Honor.

The Court: I have asked several times for an answer to the question.

David Young: Yes, sir, Your Honor.

The Court: All right. Try to give me an answer if you can; not what this other pleading has to do with what I am asking this morning. I don't see any materiality in it at all.

David Young: Does Your Honor feel that these petitioners have no right to file any application before Your Honor?

The Court: I feel your petitioners have no standing in this Court in connection with this proceedings, since it isn't a lawsuit. There are a lot of things to consider and to be considered by this jury other than the particular complaint of the people you represent. I was elected to represent these people in this county as District Judge and I intend to do that, and I intend to do it without any undue influence or interference from you.

David Young: I understand.

The Court: If you don't know it by now, as many times as I have told you you are pretty thick headed.

David Young: The answer to your question is I plead not guilty.

The Court: It will be the judgment of the court that you serve ten days in the county jail for contempt of court, to be committed immediately for contempt of this court, since you have no legal reason to state why you are not in contempt of court. Will you call the Sheriff? The record will show whether you have been given an opportunity to answer that question. If you don't know what the operation of a grand jury is this morning you will find out this morning. I tried to explain it to you the other day. I am in the

process of trying to qualify a juror, and you come in now with an application for disqualification that has no place in this record whatsoever.

David Young: Is it Your Honor's position that these petitioners have no right to assert that claim before the Chief Justice of the State of Oklahoma?

The Court: You have had since the tenth of December of last year to do that, but they haven't done so, and if you as their attorney didn't know that before now I can't tell you. I have a grand jury called for this county and I intend for it to proceed.

David Young: Will Your Honor delay sentencing?

The Court: No; it has already been done.

David Young: Is it Your Honor's ruling I have no right to appear before the Chief Justice?

The Court: You have the right to do what the law allows you to do, and you have no more rights than that; why you think you have, I don't know.

David Young: Has Your Honor read this application?

The Court: No; I don't intend to do it; I read the other one.

David Young: It is different.

The Court: I told you, Mr. Young, the other day, your parties are not parties to this proceedings with standing and qualified to file such an application; you know that. You had an opportunity to go to the Supreme Court since about the 5th of January when I told you that myself; you haven't done anything about it. It is apparently your sole purpose to disrupt the functions of this Grand Jury, and this court must assume you have some ulterior reason to do that.

David Young: To which the defendant objects in open court to the statement of His Honor.

The Court: Call the Sheriff, Mr. Bailiff.

The Bailiff: Yes, sir.

Mr. John Young: We give notice of intention to appeal from the judgment of the Court on contempt of court and ask the court to set supersedeas bond.

The Court: I will fix the bond in the sum of three thousand dollars.

John Young: Will you—ok.

The Court: That bond to be approved by the Court Clerk. Would somebody go down and wake up the Sheriff and have him come up here. I guess that is what it is; it has been five minutes since he was called.

Mr. Johnson,—

Mr. Johnson (Sheriff): Yes, sir.

The Court: We have had an unfortunate occurrence here this morning; it has been necessary for the Court to find Mr. David Young in contempt and sentence him to a term of ten days in the county jail for direct contempt. Will you take him to jail, please, sir?

The Sheriff: Yes, sir.

The Court: We will furnish you with the necessary record when we get to it.

The Sheriff: Yes, sir.

John Young: Before being committed I herewith give you a certified copy of this, which has been filed.

The Court: Leave it with him; he will make a certified copy. That is the same treatment anybody else would have.

David Young: Could I use the phone.

The Court: Certainly. He has the same rights anybody else has that is committed to jail, and no more.

(New Grand Jury selected and qualified; Grand Jury re-instructed and sworn; whereupon, the following proceedings were had, to-wit:)

Mr. Glenn O. Young: In regard to this matter of contempt of David Young, I would like to inquire what the state of the record is. I understand this charge is direct contempt?

The Court: Just a minute, Mr. Young. All the other persons called for Grand Jury duty this morning for the first time can be excused at this time, and you will check out with the Court Clerk.

Mr. Glenn O. Young: Was this intended to be a charge of direct contempt?

The Court: It is a charge of direct contempt.

Mr. Glenn O. Young: I would like an opportunity to have the reporter transcribe his notes and have the court consider immediately an—a motion for new trial.

The Court: You have a right, certainly, to have a transcript of the notes; you also have a right to file a motion for new trial.

Mr. Glenn O. Young: I would like to have it considered.

The Court: The biggest problem that I know of is the reporter here is a half hour late getting to Tulsa now.

Mr. Glenn O. Young: It is a matter of some urgency. I think it could not be more important than a matter of this character.

The Court: You can get a transcript from the reporter the same as any other—

Mr. Glenn O. Young: Would Your Honor indicate when you could hear and dispose of a motion for new trial?

The Court: As soon as the motion for new trial can be presented. As far as I know I have no other case set this morning. I had better check to be sure.

(Court adjourns.)

CERTIFICATE.

State of Oklahoma, County of Creek—ss:

I, James W. Garrett, official court reporter within and for the District Court of Creek County, Oklahoma, do hereby certify that I was present as such official reporter on January 30, 1957, and reported the attached proceedings in shorthand and that the above and foregoing is a full, true, correct and complete transcript of my notes, as they relate to the contempt proceedings herein.

Dated this the 30th day of January, 1957.

(signed) James W. Garrett,

_____,

District Court Reporter.

APPENDIX D

SEAY v. HOWELL, Dist. Judge.

No. 37111. May 14, 1957.

(Syllabus.)

1. CONTEMPT—*Act defined by statute as crime punishable under Criminal Code and not as indirect criminal contempt.*

The provisions of Art. II, § 25, Oklahoma Constitution, and 21 O.S. 1951, § 565, constitute a regulation and limitation of judicial authority over contempts of court. An act not defined by statute as an indirect contempt of court, but defined as a crime by statute, is punishable under the Criminal Code and not as an indirect criminal contempt.

2. SAME—*Contempts defined by constitutional and statutory definitions, and not common law.*

Contempts of court in Oklahoma are defined by constitutional and statutory definitions, and not by common law.

Original prohibition proceedings by petitioner, Frank Seay, against respondent, District Court of Seminole County, and the Hon. Bob Howell, Judge of said court, to prohibit respondent from proceeding further in the trial of an alleged indirect criminal contempt charge in the District Court of Seminole County. Writ granted.

George Bingaman, Purcell, and Gus Rinehart, Oklahoma City, for petitioner.

Joe Looney, County Atty., Seminole Co., Wewoka, T. H. Williams, Jr., Asst. County Atty., Wewoka, Mac Q. Williamson, Atty. Gen., By: Owen G. Watts, Oklahoma City, Embrey, Crowe, Talbert, Boxsey & Johnson By: V. P.

Crowe, and By: Val R. Miller, Oklahoma City, for respondent.

JACKSON, J. This is an original proceeding in this court by petitioner, Frank Seay, under Art. VII, § 2, Oklahoma Constitution, to prohibit respondent, district court in Seminole county, Oklahoma, and the Hon. Bob Howell, as judge of said court, from proceeding further in an indirect contempt action in Case No. 6681 in that court.

The information and affidavit for indirect criminal contempt in that court charges, in substance, that Frank Seay, an attorney, employed one R. A. Westbrook to attempt to influence the verdict of six prospective jurors who had been summoned to appear as jurors in a case then pending in the district court of Seminole county; that the said Frank Seay gave R. A. Westbrook $20 in order that Westbrook might contact the six jurors and offer and give each of them $5 to influence their verdict and decision in favor of Seay's client; and that pursuant thereto Westbrook carried out his instructions and gave four of the prospective jurors $5 each and offered the other two jurors $5 each. It is further charged in the information and affidavit that these alleged criminal acts were contemptuous and contrary to Section 25. Art. 2, Oklahoma Constitution, and Secs. 565-567 of Title 21 O.S. 1951.

We have heretofore held that under Art. VII, § 2, Oklahoma Constitution, this court has superintending control over inferior courts, *Heard* v. *Sullivan*, Okl., 280 P.2d 708, whether such lower court is acting in its civil or criminal jurisdiction. *Joseph M. Best* v. *Hon. Josh J. Evans, Judge of the Twelfth Judicial District of the State of Oklahoma, Composed of Rogers, Craig and Mayes Counties*, Okl., 297 P.2d 379.

The decisive question before us is whether the acts charged in the information and affidavit for indirect criminal contempt constitute an indirect contempt in the State of Oklahoma. If the acts charged do not constitute an in-

direct contempt the respondent should be prohibited from proceeding into the trial of the matter.

It cannot be disputed that under our form and theory of government, all governmental power is inherent in the people, Art. II, Sec. 1, Oklahoma Constitution. It is also fundamental that many functions and powers of government have, by constitutional provisions, been delegated by the people to the legislative, executive and judicial branches of government, and neither branch shall exercise powers properly belonging to either of the others, Art. IV, Sec. 1, Oklahoma Constitution. It is within the power of the people of Oklahoma to deprive the courts of their so-called inherent powers to define contempts. It is also within the power of the people to authorize the Legislature to define and regulate proceedings in matters of contempt. The immediate question before us is whether the power to define contempts has been impliedly left with the courts or specifically delegated to the Legislature. This question has been answered for us in Art. II, § 25, Oklahoma Constitution, wherein it is specifically provided:

> "The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: * * *."

Pursuant to the foregoing constitutional mandate the Legislature, in 21 O.S. 1951, § 565, has defined in direct contempts as follows:

> "* * * Indirect contempts of court shall consist of wilful disobedience of any process or order lawfully issued or made by court; resistance wilfully offered by any person to the execution of a lawful order or process of a court."

We find nothing in the foregoing statutory definition that specifically or by inference includes bribing, or attempting to bribe, a juror, as a contempt. Undoubtedly,

under the constitutional provision above quoted, bribing and attempting to bribe jurors could have been included.

The Legislature has made provision in other sections of the criminal code to insure the purity of the jury system. In 21 O.S. 1951, § 383, it is provided:

> "Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, umpire or assessor, or to any person who may be authorized by law or agreement of parties interested to hear or determine any question or controversy, with intent to influence his vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the penitentiary not exceeding ten years, or by a fine not exceeding five thousand dollars, or both."

Other penalties for attempting to influence jurors is provided in 21 O.S. 1951, § 388.

From the foregoing sections of the penal code (21 O.S. 1951, §§ 383, 388 and 565) it is apparent that the Legislature has made specific provision for the trial and conviction of those charged with the offense of bribing and attempting to bribe jurors, as a crime, but has not defined such offenses as a contempt.

We think it is significant that the Legislature has not defined bribing and attempted bribery of jurors, as a contempt, but has declared such offenses to be a crime, triable and punishable as such. We are of the opinion that when the Legislature defined contempts in Section 565, *supra*, and did not include bribing and attempts to bribe jurors in the definition, but declared such offenses to be a crime under Section 383, *supra*, that it clearly intended to remove bribing and attempted bribery from the definition of contempts. While not specifically pointed out in *Best* v. *Evans, Judge*, Okl., 297 P.2d 379, the same reasoning was applicable in that case. There two charges of direct contempt were pre-

sented and filed against an attorney. The first case charged deceitful conduct on the part of the attorney with an intent to deceive the court. Such conduct is punishable as a misdemeanor under the provisions of 21 O.S. 1951, § 575. The second case charged the attorney with knowingly presenting perjured testimony. One who procures another person to commit perjury is guilty of subornation of perjury under 21 O.S. 1951, § 503, and punishable as for perjury under 21 O.S. 1951, § 504.

In construing Art. II, § 25, Oklahoma Constitution, and 21 O.S. 1951, § 565, in the body of the opinion in *Ex parte Ballew*, 20 Okla. Cr. 105, 201 P. 525, it is said:

> "The people of this state, by section 25 of the Bill of Rights, directed the Legislature to define contempts, and a statute defining direct and indirect contempts has since been adopted, specifically enumerating what acts shall constitute contempt. Applying the rule of statutory construction, *'Expressio unius exclusio alterius,'* the affirmative description and enumeration of the acts constituting contempt implies a negative as to the exercise of such power in other cases not enumerated."

It is argued that the offense of bribing and attempting to bribe jurors is a contempt under the common law. This conclusion is supported by *Smith* v. *Speed*, 11 Okla. 95, 66 P. 511. However, it will be observed that case was decided in 1901, and prior to the adoption of our Constitution. It was there held that the judicial authority of the Territory originated in the Organic Act and that the Territorial Legislature had no power to take from the courts, whose jurisdiction originated in the Organic Act, the power to punish for contempt. Thus the Statute of 1895, page 91, Sec. 1 (now 21 O.S. 1951, § 565), was held to be in conflict with the Organic Act and therefore ineffective to deprive the courts of jurisdiction to try common-law contempts. This situation does not now exist. We have heretofore held that contempts of court in this state are now defined by con-

stitutional and statutory definitions, and not by the common law. *Best* v. *Evans, Judge*, Okl., 297 P.2d 379, *supra*. This is especially true where the supposed contempt is otherwise defined and made punishable by other provisions of the penal code. To the extent that *McKee et al.* v. *DeGraffenreid et al.*, 33 Okla. 136, 124 P. 303, holds that the common-law definition of contempts applies in this state, it is expressly overruled.

Having concluded that the acts charged in the information and affidavit for indirect criminal contempt against petitioner herein is not an indirect contempt as defined in the statute, and that the common-law definition of contempts has been abolished in Oklahoma, we find it unnecessary to consider the other propositions presented in respondent's brief.

From the conclusions herein reached, it follows that the respondent must be, and accordingly is, hereby enjoined and restrained from proceeding further against petitioner herein, as for contempt, in Case No. 6681 in the district court of Seminole county.

WELCH, C.J., and HALLEY, JOHNSON, WILLIAMS, BLACKBIRD, and CARLILE, JJ., concur.